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August 3rd, 2008

To:

Major General Gadi Shamni

GOC Central Command

By Fax

Dear Sir,

Re: **Forcible transfer of Palestinians living in the West Bank to the Gaza Strip**

1. I am writing to you regarding a new, dangerous and extremely troubling policy whereby the military has begun taking measures to initiate forcible transfers of Palestinians from their homes in the West Bank to the Gaza Strip, only because their registered, outdated, address is in the Gaza Strip.
2. According to information we received from the Spokesperson for the Coordinator of Government Activities in the Territories, a **new permit regime** was implemented as of November 2007, whereby a Palestinian whose registered address is in the Gaza Strip must hold a "permit to remain in the West Bank", otherwise he is considered an "illegal alien", even if he has been living in the West Bank for many years and even if he had never previously been required to hold a permit of any kind.

3. We were further informed by the Spokesperson for the Coordinator of Government Activities in the Territories that "no amendments were made to military legislation. The permit is issued under the authority of the Military Commander in Judea and Samaria."

In response to a petition filed by HaMoked (HCJ 9657/07 **Jarb'ua et al. v. Commander of the Military Forces in the West Bank**) it was further claimed that "any soldier, police officer or competent authority appointed thereto, has the power to remove a resident of the Gaza Strip who is present in the Judea and Samaria Area without permission outside the limits of the Area." (Response on behalf of the Respondents dated 27 February 2008).

4. We shall emphasize at this early point: even under the security legislation cited by the Respondents, the authorities do not have the power to expel persons from their homes on the claim that they violated an order regarding a closed military zone. Section 90(d) of the Order regarding Security Provisions (Judea and Samaria) (No. 378) - 1970 which stipulates powers to remove people from closed zones, explicitly establishes that these powers do not apply to permanent residents of the closed zone. As we shall demonstrate below, it is also a grave breach of international law which amounts to a war crime.
5. The new permit policy dramatically changes the legal and factual situation of many Palestinians who, according to the military's definition, suddenly turned into illegal aliens in their homes. The new policy **is being applied retroactively with no notification or publication**, severely and blatantly infringing the rights of Palestinians who have been living in the West Bank for many years and their families.

It must be noted that those Palestinians were unable to update their registered address due to Israel's freeze policy regarding updating registered addresses – a policy which now puts these individuals in danger of being expelled from their homes.

6. All this while residents of the settlements are not required to hold a permit of any kind and may live in the West Bank without permits and regardless of their registered address. This creates an absurd situation whereby settlers (who live in

the Occupied Territories in violation of international law) are free to be present in the West Bank, while Palestinians, residents of the Palestinian Authority are foreigners in their own land and must beg for various permits allowing them to continue to live in their homes.

7. Until December 2007, a Palestinian living in the West Bank and whose outdated official address was in the Gaza Strip was not required to receive a permit of any kind to do so. Cases handled by HaMoked of Palestinian residents of the West Bank who were "stuck" in the Gaza Strip because their registered address was therein, will attest to this fact (see for example HCJ 3555/05 and 4465/05). In those cases, the applicants were allowed to go back to the West Bank in order to return to their routine lives and continue living in their homes. These individuals' return to the West Bank and their continued presence and residence in their homes therein were regulated by a single permit: a one day permit to transit through Israel – **and with no requirement or need for another permit for the purpose of continuing to live in their homes in the West Bank.**
8. Today, you have decided to set a new policy, with no legal provisions whatsoever and no public notification and to apply it retroactively while violating the rights of innocent Palestinians who have acted in accordance with known and existing law, under which no permit is required to live in the West Bank. This conduct is unlawful and inconsonant with the very fundamental rules of administrative and international law.

Regarding the prohibition on retroactive application see:

Articles 64 and 65 of the IVth Geneva Convention and Pictet's interpretation – Pictet, Jean S. ed. – *Commentary: The Geneva Conventions of 12 August 1949*, ICRC, 1958. pp. 338-339); Article 75(4)(c) of the First Protocol Additional to the Geneva Convention (1977); Article 22(1) to the Rome Statute of the International Criminal Court (1998) and the most fundamental principal of criminal law *noella poena sine lege*; Article 15 of the International Covenant on Civil and Political Rights (1996); Article 40(2)(a) of the Convention on the Rights of the Child (1989); Article 11 of the Universal Declaration of Human Rights (1948) Article 7(1) of the European Convention on Human Rights (1950); Article 6(2)(c) of the Second Protocol Additional to the Geneva Convention (1977); Rule 101 in the

ICRC's research on customary international humanitarian law (Henckaerts J.M. Doswald-Beck L., *Customary International Humanitarian Law*, Vol I: Rules, ICRC 2005, pp. 308-310).

9. HaMoked has recently handled several cases of Palestinians who have been living in the West Bank for many years and who were removed from their homes by military forces in the middle of the night. They were told, to their amazement, that they were candidates for expulsion to the Gaza Strip since they did not hold "permits to be present" in the West Bank. They had never previously heard of this requirement, since, as noted, it was never publicized or provided for in law. Their expulsion from their homes, families, places of employment and their environment for many years was prevented only upon intervention by HaMoked.
10. The military's arrival to the West Bank homes of protected Palestinian civilians in a deliberate search for innocent Palestinians who, due to Israel's freeze policy, were unable to update their registered address from the Gaza Strip to their place of residence in the West Bank – for the purpose of expelling them from their homes and families, based on new "regulations" which create a new reality and apply retroactively, without publication or legal provisions, is a grave practice which is characteristic of **dark regimes**. It stands in sharp contrast to the Military Commander's obligations, the foremost of which is to protect and promote the rights of protected civilians and maintain public order.
11. The basic premise is that the Military Commander's powers are in essence **temporary**. The Military Commander's discretion is narrow and limited by two "magnetic poles": the good of the population on one hand and security considerations on the other. The Military Commander is not the sovereign but a temporary ruler by force of the laws of war and as such, he may not take measures to perform fundamental changes in the occupied territory unless such measures benefit the protected population. This principle includes a prohibition to lead legislative, economic and in particular **demographic** changes.

Regarding the obligations of the military commander see:

Article 43 of the Hague Regulations; H CJ 393/82 **Jam'iyat Iscan v. Commander of the IDF Forces in the Judea and Samaria Area**, *Piskei Din* 37(4) 785, 792

(1983); HCJ 10356/02 **Hass v. Commander of the IDF Forces in the West Bank**, *Piskei Din* 58(3) 443, 456 (2004); HCJ 2056/04 **Beit Souriq Village Council v. Government of Israel**, *Piskei Din* 58(5) 807, 833-834 (2004); HCJ 1661/05 **Hof Aza Regional Council v. Prime Minister**, *Piskei Din* 59(2) 481, 519 (2005); HCJ 351/80 **Electric Corporation Jerusalem District v. Energy Minister**, *Piskei Din* 35(2) 673, 692 (1981).

12. Article 49 of the Geneva Convention (1949) strictly prohibits forcible transfers of protected civilians:

Individual or mass **forcible transfers**, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or **to that of any other country, occupied or not, are prohibited, regardless of their motive.**

13. The prohibition on forcible transfers is of the gravest in the convention. **Its violation is considered a grave breach.** The significance of this is that anyone who performs or orders to perform a forcible transfer of protected persons bears personal international criminal responsibility for his actions and every party to the convention is under obligation to seek and prosecute any such person, regardless of his nationality.
14. The statute of International Criminal Court also establishes that deportation and forcible transfers are war crimes which the Court is empowered to hear (Article 8(2)(a)(viii)). The Court's statute also determines that forcible transfers constitute a crime against humanity when carried out as part of a systematic policy.
15. **The matter is clear:** The Military Commander is not permitted to take measures to promote demographic changes in the occupied territory. The Military Commander is not permitted to take measures to expel Palestinians from their homes in the West Bank – all the more so when such measures are carried out by force of decisions which are applied retroactively, without publication and with no legal provisions.

Such conduct is diametrically opposed to his duties and powers as the military commander of an occupied territory and contravenes the gravest prohibitions in Israeli and international law.

16. Considering the above, we expect that you cancel the new permit regime forthwith and immediately cease the illegal operations designed to search and expel Palestinians living in the West Bank who have not updated their registered address due to Israel's freeze on address change procedures.

Sincerely,

Abeer Jubran, Adv.

Copies:

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